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Comment on Recent Cases

APPEARANCE: WAIVER OF IRREGULARITY OF SERVICE.—It is a well settled rule that by voluntarily appearing, without objecting to the jurisdiction of the court, a defendant may waive any defect in the process by which he has been brought in. A special appearance, on the other hand, made merely for the purpose of objecting to the sufficiency of the process, does not operate as a waiver. As a general rule, whether a given act amounts to a general appearance depends upon the character of the relief sought thereby, and not upon the form of the act nor the expressed intent of the party that the appearance is for a limited purpose only.[1] In California, however, the subject is involved in no little confusion arising from the interpretation of section 1014 of the Code of Civil Procedure. This section provides that a defendant appears in an action when he answers, demurs, or gives the plaintiff written notice of his appearance, or when an attorney gives notice of appearance for him; and that upon the entering of such an appearance, the defendant is entitled to notice of subsequent proceedings. The earlier cases construed this section as prescribing the only mode in which an appearance may be made.[2] Some later decisions, on the other hand, without expressly overruling these earlier cases,

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[1] "Where a defendant appears and asks some relief which can only be granted on the hypothesis that the court has jurisdiction of the cause and the person, it is a submission to the jurisdiction of the court as completely as if he had been regularly served with process, whether such an appearance, by its terms, be limited to a special purpose or not." Belknap v. Charlton (1893), 25 Ore. 41, 34 Pac. 758. See also Security etc Co. v. Boston etc. Co. (1899), 126 Cal. 422, 58 Pac. 942, 59 Pac. 296; Winters v. Union Packing Co. (1908), 51 Ore. 97, 93 Pac. 97; Olcese v. Justice's Court (1909), 156 Cal. 82, 103 Pac. 317.

[2] Powers v. Braly (1884), 75 Cal. 237, 17 Pac. 197, where it was held that an application for an extension of time pending a motion to quash service, did not amount to a submission to the jurisdiction, because not one of the acts named in section 1014 of the Code of Civil Procedure. In Vrooman v. Li Po Tai (1896), 113 Cal. 302, 45 Pac. 470, section 1014 was construed as being intended to settle all dispute upon the question as to what constitutes an appearance, and hence the court said that there was no chance for argument about equivocal acts. A later case contains the following statement: "While the statute requires the notice of appearance by defendant in pro per. to be a written notice, such requirement is not exacted when the notice is given for him by an attorney. In such case, it need not necessarily be in writing." Salmonson v. Streiffer (1910), 13 Cal. App. 395, 397, 110 Pac. 144, 145. Such a technical construction of the section would probably not be followed. In Siskiyou County Bank v. Hoyt (1901),

have held that unequivocal acts other than those specified by section 1014 may constitute an appearance.[3] The Supreme Courts of Nevada and Oregon, in construing a code provision corresponding to our own, have consistently held the section to be one governing the giving of notice, and not one prescribing the mode in which an appearance shall be entered.[4]

Where a general appearance is entered only after an unsuccessful attempt to contest the jurisdiction of the court, should the defendant be held to have thereby waived all irregularities as to the process or the service thereof? According to the holding of the Montana Supreme Court in the case of *State ex rel. Lane v. District Court*[5] such a general appearance will not operate as a waiver. In this case, Lane, a non-resident, applied to the Supreme Court for a prohibition to stay further proceedings in a cause in which he had been served with summons while only temporarily within the state for the purpose of appearing as a witness. The

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132 Cal. 51, 64 Pac. 118, it was held that a verbal authority to enter judgment did not constitute an appearance. See also Hibernia Sav. & L. Society v. Lewis (1896), 111 Cal. 519, 44 Pac. 175.

[3] In contrast to the cases cited in note 2, supra, we find the following: Cooper v. Gordon (1899), 125 Cal. 296, 57 Pac. 1006, signing of a stipulation authorizing plaintiff to take judgment amounted to a general appearance; Anglo-California Bank v. Griswold (1908), 153 Cal. 692, 46 Pac. 353, written notice of appearance had been given to the plaintiff, but this notice was not filed with the court until after the expiration of three years. It was held that this constituted an appearance. The court said: "Of course, jurisdiction of a defendant is not acquired until the filing of such appearance in court . . . . but the principal purpose of section 1014 of the Code of Civil Procedure is served in that, after giving written notice of appearance to plaintiff, the defendant is entitled to notice of all subsequent steps and proceedings in the action;" Roth v. Superior Court (1905), 147 Cal. 604, 82 Pac. 246, an unfiled stipulation extending time was held to constitute a "virtual" appearance, though it was filed after the expiration of three years; Altpeter v. Postal Telegraph Co. (1915), 26 Cal. App. 705, 148 Pac. 241, contains this dictum: "A defendant appears in an action when he answers, demurs, or gives the plaintiff written notice of his appearance, or when an attorney gives notice of appearance for him. Code Civ. Proc., § 1014. The Supreme Court has held that an appearance may be made in an action by acts other than those enumerated in the statute, but they must be of an unequivocal character showing a submission to the general jurisdiction of the court, such as calling for some affirmative relief," citing Vrooman v. Li Po Tai, supra, n. 2, and Salmonson v. Streiffer, supra, n. 2.

It is interesting to note the effect which this line of decisions has probably had upon the Legislature. Prior to 1907, section 396 of the Code of Civil Procedure provided that if an action be brought in the wrong county, the action may, notwithstanding, be tried therein, unless the defendant "at the time he appears and answers or demurs," files an affidavit of merits and asks for a change of venue. By amendment of 1907, the words "appears and" before the word "answers" were stricken out as superfluous.

[4] Belknap v. Charlton (1893), 25 Ore 41, 34 Pac. 758; State v. McCullough (1867), 3 Nev. 202.

[5] (Mont., Dec. 1915), 154 Pac. 200.

trial court, upon Lane's motion, had refused to quash the service of summons, and had ordered him to answer. Thereupon, he filed an answer, and then applied for a writ of prohibition. The Supreme Court held that the service of summons should have been quashed, and that the relator did not waive his objection to the irregularity of the process by filing his answer. This decision proceeds upon the ground that in filing his answer, Lane did not act voluntarily, but in response to the order of the court, and that, therefore, there could be no waiver. The court differentiates the case of State ex rel. Mackey v. District Court[6] from the principal case upon this ground. It is by no means clear, however, that the order of court in this case had any more compelling force than the possibility of the recovery of a default judgment would have in any civil suit.[7]

Although the rule announced by the principal case is followed in a large number of jurisdictions, including the United States Supreme Court, and is lauded as being a most reasonable one,[8] a number of states, including California, have adopted the contrary rule to the effect that a general appearance, after an unsuccessful attack upon the jurisdiction of the court, operates as a waiver of all irregularities in the process.[9] The reason underlying this rule is that where a defendant proceeds to contest the cause upon its merits, he should not be permitted to say that the court has jurisdiction to render a judgment favorable to him, but if the result is unfavorable, that the court has no jurisdiction to render a judgment against him. A further reason for this rule is found in the fact that objections to the jurisdiction of the court are of a technical and dilatory character, and should not be looked upon by the courts with favor.

J. D. R.

ATTORNEY AND CLIENT: RIGHT OF CLIENT TO COMPROMISE CLAIM WITHOUT CONSENT OF ATTORNEY.—Should the adverse party be protected in his dealings with an attorney substituted in an action upon the motion of the client, by an order regular upon

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[6] (1910), 40 Mont. 359, 106 Pac. 1098, 135 Am. St. Rep. 622.

[7] Where a defendant is brought into court under a warrant, his appearance is held not to be voluntary, and does not operate as a waiver of irregularity in the process. Warren v. Crane (1883), 50 Mich. 300, 15 N. W. 465.

[8] 2 R. C. L. 339; 3 Cyc. 525, 526. The theory of this rule is that the defendant, having done all that he could in objecting to the jurisdiction of the trial court, should not be compelled to submit to a judgment by default as a condition of having the jurisdiction of the trial court tested on appeal. Corbet v. Physicians' Casualty Ass'n (Wis., 1908), 16 L. R. A. (N. S.) 177, 178 n.

[9] In re Clarke (1899), 125 Cal. 388, 58 Pac. 22, overruling Deiderheimer v. Brown (1857), 8 Cal. 339, and Lyman v. Milton (1872), 44 Cal. 630; Corbett v. Physicians' Casualty Ass'n (1908), 135 Wis. 505, 512, 115 N. W. 365, 368, 16 L. R. A. (N. S.) 177; Dailey v. Kennedy (1887), 64 Mich. 208, 31 N. W. 125.